FIRST NATIONS SUMMIT

CAUTIOUS OPTIMISM:
THE FIRST NATIONS SUMMIT PERSPECTIVE ON TREATY NEGOTIATIONS

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The 1990's heralded a decade of optimism for the negotiated resolution of the land question and for the recognition of the inherent authority of First Nations to govern themselves in their traditional territories. To achieve these objectives, Canada, British Columbia and First Nations established a process for the negotiation of treaties that were to address both the land question and Aboriginal self-government.

As a first step, Canada, British Columbia and the First Nations Summit established the British Columbia Treaty Commission to facilitate the negotiation process. The Treaty Commission was also expected to ensure there was some semblance of a level playing field in the negotiation process. The role and effectiveness of the Treaty Commission is currently under review, as required by the original agreement under which it was established.

Treaty Commissioners were appointed in 1993 and treaty negotiations began in 1994. Progress at the forty-two negotiation tables has been a great deal slower than anticipated. To date, the parties have not successfully concluded any agreements-in-principle or treaties. A number of agreements-in-principle initialed in 2001 by negotiators for the parties did not receive the necessary political support in the First Nations communities. This was largely because the formula-driven land and financial resource packages were seen as insufficient to enable First Nations to achieve and maintain self-sufficiency. As well, First Nations were being asked to make significant concessions, while receiving no assurance that the treaties would improve the standard of living.

While progress has been slow on the negotiation front, First Nations have achieved a greater degree of success in litigation, beginning with *Sparrow* in 1990, through to the *Delgamuukw* decision in 1997 and the *Campbell* case in 2000. Most recently, the British Columbia Court of Appeal in the *Council of the Haida*

Nation case, building on the *Taku River Tlingit* case, case found that both industry and government have a legal obligation to meaningfully consult with and accommodate the interests of First Nations. For the most part, the federal and provincial governments have done little to implement these court decisions. The British Columbia Government has reacted to the latest round of court decisions by rallying government employees to prepare for litigation, rather than implementing the requirement to consult and accommodate.

The unwillingness of the federal and provincial governments to adjust their negotiators' mandates to accommodate the advances in the courts has been the source of a great deal of frustration and delay at the treaty negotiation tables. The British Columbia Government's recent referendum that sought to limit First Nations' inherent right of self-government, which the British Columbia Supreme Court has determined is recognized and affirmed by the Constitution, also slowed negotiations. The federal government, for its part, recently issued notices to at least a dozen negotiating tables threatening to shut down negotiations due to "lack of progress".

In our view, the lack of progress is largely reflective of the level of political will to negotiate and conclude fair and comprehensive agreements. For example, until recently the issue of compensation was not an item for negotiation. Even now, it is only an issue that may be "explored" at negotiation tables. As well, notwithstanding court decisions from the Supreme Court of Canada which state Aboriginal title in British Columbia has never been extinguished, neither Canada nor British Columbia will recognize the existence of Aboriginal title to any part of British Columbia. They state this must be proven through litigation.

For the time being, the legal uncertainty will continue and capital will be invested elsewhere. To achieve certainty, Canada and British Columbia will have to provide mandates for their negotiators that are sufficiently broad and flexible to conclude treaties with First Nations.

Despite our considerable frustration, we remain hopeful that in the coming year agreements-in-principle will be reached at several tables. Only time will tell whether our optimism is well founded.

GRAND CHIEF EDWARD JOHN
FIRST NATIONS SUMMIT TASK GROUP
(POLITICAL EXECUTIVE)